QUESTION PRESENTED

Whether due process was violated by admission of evidence of the flight of petitioner's alleged co-conspirator upon learning of petitioner's arrest.

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In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-1286

WILLIAM A. BORDERS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A6-A30) is reported at 693 F.2d 1318. The opinion of the district court (Pet. App. A1-A5) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on December 10, 1982. A petition for a writ of certiorari was filed on January 25, 1983. The jurisdiction of this Court is invoked under 28 U.S.C.1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Georgia, petitioner was convicted of conspiring with United States District Judge Alcee L. Hastings to solicit and accept a bribe in exchange for influencing the outcome of a case pending in Judge Hastings' courtroom, in violation of 18 U.S.C. 371 (count 1);

corruptly impeding the administration of justice, in violation of 18 U.S.C. 1503 and 2 (count 2); and travelling in interstate commerce with intent to commit bribery, in violation of 18 U.S.C. 1952 (counts 3 and 4). He was sentenced to concurrent terms of 5 years' imprisonment on each count and a $35,000 fine.

The evidence at trial is detailed in the court of appeals' opinion. It showed that in December 1980, Frank Romano and Thomas Romano were convicted after a jury trial in Judge Hastings' courtroom on 21 counts of racketeering and related charges. On May 4, 1981, Judge Hastings ordered the forfeiture of $1.2 million worth of the Romanos' racketeering-related property pursuant to 18 U.S.C. 1963(a) (Pet. App. A7-A8).[1]

In September 1981, the FBI began an investigation into the Romano proceedings after receiving tips from one William Dredge, an informant who was a former client of petitioner. On September 10, Dredge arranged to introduce petitioner to "Frank Romano" on September 12 at the Miami International Airport. Petitioner later placed two calls to Judge Hastings' chambers in Miami. On September 11, Hastings telephoned petitioner from a pay phone at the Miami airport and left a message with petitioner's secretary

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[1] At the Romanos' sentencing hearing on July 8, 1981, Judge Hastings considered whether a recent Fifth Circuit opinion, *United States* v. *Martino*, 648 F.2d 367 (1981), which reversed a forfeiture order similar to the one entered in the Romanos' case, mandated the reversal of the May 4 forfeiture order. Judge Hastings upheld the forfeiture order after hearing extensive argument on the meaning of *Martino* (Pet. App. A13-A14).

On August 2, 1982 — well after the Romano forfeiture proceedings had run their course — the Fifth Circuit, sitting en banc in *Martino*, vacated the portion of the panel decision that reversed the trial court's forfeiture order, and affirmed the order as entered. 681 F.2d 952. This Court has since granted certiorari on the issue *sub nom. Russello* v. *United States*, No. 82-472 (Jan. 10, 1983).

that his flight was delayed and he would not leave until 5 p.m. Petitioner accordingly changed his flight to Miami from a 7:30 p.m. departure to a flight that left later that night. This change provided Hastings and petitioner with time to meet at National Airport when Hastings' flight arrived at 8:00 p.m. (Pet. App. A8).

On September 12, Dredge and a retired FBI agent Paul Rico, who was posing as Frank Romano, met petitioner at a restaurant at the Miami airport. Petitioner asked Rico/Romano, who was wearing a concealed body recorder, whether he knew "what the number" was. When Rico hesitated, petitioner wrote "$150,000"[2] on a piece of paper and then wrote "within 10 days an order will be signed returning a substantial amount of property." Petitioner also told Rico that the "other" — apparently referring to reduced prison sentences — would come after Rico/Romano withdrew a pending appeal and filed a motion for mitigation of sentence in the district court (Pet. App. A8-A9).[3]

At a second meeting in Miami on September 19, Rico gave petitioner an envelope containing $25,000 in $100 bills

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[2]In reprinting the court of appeals' opinion, the appendix to the petition mistakenly recites a different figure. Compare Pet. App. A9 with 693 F.2d at 1320.

[3]Petitioner also suggested that Rico name a time and place for Judge Hastings to have dinner the following week. If Judge Hastings was then observed having dinner at the restaurant of Rico's choice, Rico would be certain that petitioner had influence with Judge Hastings. Rico accordingly named the main dining room at the Fontainbleu Hotel at 8 p.m. on September 16. Thereafter, FBI agents observed Judge Hastings arrive for dinner at the main dining room of the Fontainbleu at 7:45 p.m. on September 16 (Pet. App. A9-A10).

At approximately the same time, Judge Hastings told his law clerk to draft an order returning the Romanos' money after the clerk had informed him that the Fifth Circuit had followed the panel decision in the *Martino* case in *United States* v. *Peacock*, 654 F.2d 339, 351 (5th Cir. 1981). Pet. App. A13-A14.

as "up front" money; they agreed that Rico would pay the remainder of the money at a later time. Petitioner told Rico that the forfeited property would be released within 10 days (Pet. App. A10-A11).

On Friday, October 2, Rico called petitioner and inquired into the status of the forfeiture order. Petitioner replied that he was uncertain and suggested that Rico call him at home on Sunday, October 4. Petitioner then attempted to call Judge Hastings, but Hastings' secretary stated that he had left for the day. Rico telephoned petitioner again on Sunday morning, but petitioner said that he still "had [not] been able to talk to anybody" and suggested that Rico call him at the office the next day (Pet. App. A12).

The following day, October 5, Judge Hastings instructed his law clerk to "[d]o the order [returning the Romanos' money] * * * today" (Pet. App. A14).[4] When Rico called petitioner at 4:30 p.m., petitioner said that "the matter" had "been taken care of" and that Judge Hastings' order would probably be mailed out that day or the following morning. Shortly afterwards, Judge Hastings called petitioner and reported that he had "drafted all those * * * letters * * * for him."[5] Hastings promised that he would "send the stuff off to Columbia in the morning." The next day, Judge Hastings issued an order that reversed in part the original $1.2 million forfeiture order, returning more than $845,000 in forfeited property to the Romanos (Pet. App. A12-A13).

Rico called petitioner twice the next day — once to inquire about the status of the order and later to report that he had received word of the order and was satisfied. They

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[4]According to the clerk's testimony such behavior was "unusual" for Judge Hastings and "not in the ordinary course of things" (Pet. App. A14).

[5]Court authorized wiretaps were installed on petitioner's office and home telephones on October 2 (Pet. App. A12).

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then agreed that the final payoff would occur on October 9 in Washington, D.C. (Pet. App. A14).

The National Bar Association planned to honor petitioner, its former president, with a testimonial dinner in Washington on October 9. The day before, Judge Hastings called petitioner to say that he would arrive in Washington at 10:40 the next morning. Petitioner picked Hastings up at the airport on October 9 and the two drove to the L'Enfant Plaza Hotel, where they had reserved a suite and an adjoining room. Thereafter, petitioner and Hastings went to petitioner's law office, where petitioner received a message to call "Frank" (Rico) at a local Marriott Hotel. Petitioner returned the call from his office and agreed to meet Rico at once at the Marriott. Rico told petitioner that he had brought "all the necessary papers" (Pet. App. A14-A15).

Petitioner left Judge Hastings at his office and drove to the Marriott. After Rico told petitioner that "it" was in the room, petitioner told him to get "it" and take a ride with him in petitioner's car. The two got into petitioner's car and Rico placed a bag containing $125,000 in the seat between them. FBI agents pulled them over as soon as petitioner started to drive out of the parking lot (Pet. App. A15).

In the meantime, Judge Hastings returned to the hotel and had drinks with Hemphill Pride, a mutual friend of Hastings and petitioner, who had come to Washington to attend the dinner. When Pride returned to his hotel room he received a telephone call from petitioner's attorney, John Shorter. Shorter informed Pride that petitioner had been arrested on charges relating to bribery that took place in Hastings' courtroom and that the FBI wanted to interview Hastings (Pet. App. A16).

Pride next telephoned Hastings in his room and told him that he had an important message. The two met outside a hotel elevator, where Pride related Shorter's phone call.

According to Pride's testimony, Hastings' reaction was one of shock. Pride advised Hastings to return to Miami, where he would be in a "better position" than in Washington. The two then proceeded to Hastings' room, where Pride helped Hastings pack his clothes. Pride offered to give Hastings a ride to the airport, but Hastings declined, saying that he did not want Pride to "get involved." Hastings then left the hotel without paying his bill or picking up a suit he had left at the hotel cleaners. Instead of taking the next flight to Miami from nearby National Airport, however, Hastings travelled to Baltimore-Washington International Airport, 32 miles northeast of the hotel, to take a later flight and did not arrive in Miami until later that night (Pet. App. A16-A17).

From the Miami airport, Hastings went to his fiancee's home and arrived there between 9:30 and 10:00 p.m. Soon afterwards, two FBI agents arrived and interviewed Hastings for two to three hours (Pet. App. A17-A18).

ARGUMENT

The evidence in this case indisputably established that petitioner solicited and accepted a $150,000 bribe for the purpose of influencing Judge Hastings' action in a pending case. Because petitioner was not himself a public official, he was charged with conspiring with Judge Hastings in the bribery scheme. The critical issue for the jury's determination at trial was therefore whether this was simply a fraud scheme executed by petitioner on his own, in which case he would not be guilty of conspiracy, or whether Judge Hastings was a culpable participant in the scheme. It was to show this latter point that the prosecution introduced the challenged evidence. Petitioner contends (Pet. 8-10) that the evidence of Judge Hastings' precipitous departure upon learning of petitioner's arrest was inadmissible. The court of appeals correctly rejected this argument, ruling that admissibility of such evidence is within the discretion of the trial

judge, whose rulings on such a matter will not be overturned absent clear abuse. Further review by this Court is not warranted.

Petitioner appears (Pet. ii, 9) to focus his objection to admission of this evidence on the fact that it involved actions subsequent to the termination of the conspiracy by petitioner's arrest. As the court of appeals observed (Pet. App. A19 n.18), this Court has distinguished between post-conspiracy *declarations* of a conspirator, which are ordinarily not admissible against a co-conspirator, and post-conspiracy acts of a conspirator. Acts that are not intended to be a means of expression are admissible; they are not hearsay and need not be excluded simply because they occur after the conspiracy has terminated. *Lutwak* v. *United States*, 344 U.S. 604, 617-618 (1953). As in *Lutwak*, evidence of Judge Hastings' hurried departure from Washington was admissible to prove his involvement in and the existence of a conspiracy. See, *e.g.*, *United States* v. *McLaughlin*, 578 F.2d 1180, 1184 (5th Cir. 1978).

Petitioner seeks to avoid this principle by arguing (Pet. 9-10) that Judge Hastings' flight was assertive conduct, *i.e.*, nonverbal conduct that was intended as a substitute for oral or written expression. It is true that evidence of conduct that is simply a substitute for a verbal declaration is inadmissible if evidence of the declaration could not be admitted.[6] But while Judge Hastings' behavior could properly be taken to show a consciousness of guilt on his part, it is frivolous to suggest that the behavior was designed to make

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[6]Such conduct, for example, as "pointing to identify a suspect in a lineup, is clearly the equivalent of words, assertive in nature, and to be regarded as a statement." Fed. R. Evid. 801(a) advisory committee note. See, *e.g.*, *United States* v. *Morris*, 623 F.2d 145, 148 n.1 (10th Cir.), cert. denied, 449 U.S. 1065 (1980); *United States* v. *Perez*, 658 F.2d 654, 659 (9th Cir. 1981).

the statement "I am guilty," which would be necessary to support petitioner's equation of the act of fleeing with *assertive* conduct.

Thus, evidence of flight is correctly regarded as conduct lacking in direct assertive value. See *United States* v. *Lobo*, 516 F.2d 883, 884 n.1 (2d Cir.), cert. denied, 423 U.S. 837 (1975) ("[w]hile a flight [may be viewed as an admission and therefore] not hearsay," * * * [p]referably it is to be viewed as conduct offered as circumstantial evidence rather than for its assertive testimonial value"); see also *McCormick's Handbook on the Law of Evidence* § 262, at 629 (E. Cleary 2d ed. 1972). This view was reflected in the trial court's instructions that the jury could consider the flight as evidence of a consciousness of guilt on the part of Judge Hastings but that it could also determine that there might be innocent reasons—not related to a consciousness of guilt—for his unwillingness to be interviewed immediately by law enforcement agents (Tr. 1167-1168; Pet. App. A25-A26). Hence, as the court below concluded, the evidence was admissible under *Lutwak*, and the district court did not abuse its discretion in admitting it as post-conspiracy conduct providing circumstantial evidence of participation in the conspiracy.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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